DATE: October 31, 1996
CASE NO.: 95-INA-73

In the Matter of:

NUNC, INC.,
Employer

On Behalf of:

JACOB LUND NIELSEN,
Alien

Appearance: William Getzoff, Esq.
For the Employer

Before: Huddleston, Jarvis, and Vittone
Administrative Law Judges

Richard E. Huddleston
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the

prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On May 5, 1993, the Employer filed an application for labor certification to enable the Alien to fill the position of tool and die maker at an hourly wage of $18.36. The Employer listed requirements of 10 months of training and two years of experience in the job (AF 211-213). The Employer also included a special requirement that the applicants must speak and read Danish. The job duties to be performed were described as follows:

> Lays out, machines, fits, assembles, and finishes metal parts to make and repair dies for diecasting of metal molds for injection or compression molding of plastic, analyzing specifications, and applying knowledge of die and mold design and construction. Preparation of sketches and blueprints of product and die or mold, and computation of specifications, application of knowledge of shop mathematics and plastic molding processes and machinery. Plans sequence of operations, visualizing shape of die or mold in reverse of product. Measures, makes, and scribes metal stock to lay out for machining. Sets up and operates machines, such as horizontal boring mill, engine lathe, profile, milling machine, and pantograph machine to machine outer dimensions and contoured cavity of die or mold. Grinds, files, sands parts, using files, emery cloth, and powered grinders, to fit parts for assembly and to smooth and finish cavity. Assembles die or mold, using handtools and CNC equipment. Verifies dimensions, using calipers, planer gages, and dial indicators.

On February 28, 1994, the CO issued a Notice of Findings ("NOF") in which she stated that the foreign language requirement has not been adequately documented as arising from business necessity and is, therefore, unduly restrictive; and, that two applicants were rejected for not having the requisite minimum experience when the experience requirement was not listed in either the published advertisement or the job posting announcement (AF 204-206). The CO also stated that the ETA 750B form does not show the number of hours per week the Alien worked and that it is, therefore, unclear whether the Alien meets the requirements.

---

[1] All further references to documents contained in the Appeal File will be noted as "AF n," where *n* represents the page number.

On March 16, 1994, the Employer submitted rebuttal evidence to the NOF (AF 143-200). On March 31, 1994, in response thereto, the CO issued a second NOF (AF 201-203). Therein, the CO acknowledged that the Employer's rebuttal was sufficient to establish a business necessity for the foreign language requirement. However, she then stated that documentation submitted in conjunction with the Employer's rebuttal raised the issue of whether the job opportunity, as described, represents the Employer's actual minimum requirements for the job opportunity. The CO questioned whether the Employer has hired workers with less training or experience for job similar to that involved in the job opportunity, or whether it is not feasible to hire workers with less training or experience than that required by the Employer's job offer. Specifically, the CO stated that a further review of the 750B form and supporting documentation indicates that the Alien gained his qualifying experience while employed with a Danish company that appears to be closely related to the Employer.

On April 15, 1994, the Employer submitted rebuttal to the second NOF (AF 129-134). On July 21, 1994, the CO issued a Final Determination, concluding that the Employer's job requirements are not its actual minimum requirements inasmuch as the Alien's experience was gained with the Employer. The CO further stated that the Employer has failed to respond to the issue raised in the first NOF concerning the Alien's weekly hours of employment, although she acknowledged that the issue was not repeated or addressed in the second NOF.

On August 22, 1994, the Employer requested review of that denial before an Administrative Law Judge and submitted additional documentation in support of its application for labor certification (AF 1-125).

Discussion

Section 656.21(b)(6) provides that "the employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and that the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity. . . ." In the case at hand, the CO concluded that the Alien's experience was gained with an affiliated company in Denmark and that he, therefore, gained his experience while working for the Employer. Thus, if the Alien was hired by the related company for a similar position without the two years of experience that is now being required, the Employer is requiring more extensive experience for U.S. applicants than it required from the Alien. An employer is not allowed to treat an alien more favorably than it would a U.S. worker. *ERF, Inc., d/b/a Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990).

In order to establish that the Alien gained his qualifying experience with a different employer, the Employer must demonstrate that its ownership and control are separate and distinct from the company where the Alien gained his qualifying experience. *Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 90-INA-200 (May 23, 1991). The Employer must establish that its ownership and control are separate and distinct from the company where the Alien gained his qualifying experience. Where all of an alien's

qualifying experience is gained while working for a parent corporation of the employer, his employment by the subsidiary employer violates § 656.21(b)(6). *Inmos Corp.*, 88-INA-325 (June 1, 1990) (*en banc*). The Employer's own submission indicates that the control is not separate. In the application for labor certification, Form 750A, the Employer set forth its reasons for requiring fluency in the Danish language as follows:

> A/S Nunc, a Danish corporation is the affiliate for [the Employer]. The U.S. corporation [the Employer] obtains specifications, instructions and engineering consultation from its Danish affiliate. Fluency in Danish is necessary because of the technical nature of the information and the necessity to communicate directly with engineers in Denmark.

The fact that the employer states that the instructions and specifications come from its affiliate in Denmark establishes that control is not separate. The Employer also submitted details on the relative corporate structure of the two companies. While it argues that each corporation is operated separately and distinctly from the other, it concedes that three directors of the Danish corporation are also directors of the Employer. However, the Employer argues that because this does not constitute a majority of directors, there is no evidence of control. We do not agree. The similarity of the work as evidenced by the job descriptions of the Alien's previous and current jobs, the fact that three directors serve both corporations, and the fact that the American company receives instructions from the Danish company requiring the job holder to be fluent in Danish, establishes that its ownership and control are not separate and distinct from the company where the Alien gained his qualifying experience.[2]

Because the Employer failed to establish that the two companies are not substantially related, labor certification must be denied unless the Employer can establish that the experience the Alien gained with its Danish affiliate was in a lesser job that is sufficiently dissimilar to the job offer. See *Brent-Wood Products, Inc.*, 88-INA-259 (Feb. 28, 1989) (*en banc*). The Employer argues that in the earlier job the Alien was highly supervised at all times and was actually an apprentice. The Alien's 750B form lists his prior experience with A/S NUNC Denmark from August 1988 to May 1992 (AF 213). The job duties listed are virtually the exact same job duties that are listed for his present employment, beginning in May 1992, with the Employer named herein. The job titles are exactly the same. In 1988, at the age of 17, the Alien was concurrently enrolled in a technical school course of study which ended in February 1992. No other job experience is listed and it is most likely, given his age at the time he began employment, that there is no previous employment.

We find that the evidence establishes that the positions were essentially the same and that the Alien was hired with no experience and then trained for the position while attending a technical school. The burden is on the Employer to show why it cannot now

---

[2] The Employer submitted additional documentation concerning these companies in conjunction with its request for review. This material was never reviewed by the CO and cannot, therefore, be considered before the Board. *Schroeder Brothers Co.*, 91-INA-324 (Aug. 26, 1992).

train a new employee in a similar fashion. An employer must sufficiently document a change in circumstances to demonstrate infeasibility. See *Rogue and Robelo Restaurant and Bar*, 88-INA-148 (Mar. 1, 1989) (*en banc*). The employer's burden of establishing why it is not now feasible to offer the same favorable treatment to U.S. applicants is a stringent burden. *58th Street Restaurant Corp.*, 90-INA-58 (Feb. 21, 1991). The Employer argued in its second rebuttal submission as follows:

> Due to the complexity of the molds and the high level of skill needed to operate the equipment, it is not feasible to hire workers with less training or experience than that stated in the job offer. [The Employer] has, in fact hired no workers since its incorporation in Delaware in December 22, 1986 for jobs similar to that involved in the job offer with less training and experience.

We find that the Employer has failed to establish that it cannot hire and train a U.S. worker in the same manner in which the Alien was trained. The Employer has presented no persuasive evidence that establishes that the molds and high level of skill are any different than the Alien handled with no experience or prior training. The fact that the Employer has not hired any workers with less training and experience than it listed in its application for labor certification is immaterial. The employment situation of the Alien for whom certification is being sought must be viewed within the framework of the regulations cited herein. The Employer has failed to meet the provisions set forth in these regulations. Accordingly, labor certification must be denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of October, 1996, for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk

Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.